

1416303 (Migration) [2015] AATA 3543 (13 October 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Salman Berjees
VISA APPLICANT:	Mrs Sofia Salman
CASE NUMBER:	1416303
DIBP REFERENCE(S):	OSF2013/032065
MEMBER:	Catherine Wall
DATE:	13 October 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 13 October 2015 at 10:30am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 August 2014 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. Ms Sofia Salman is a 28 year old citizen of Pakistan. She applied for the visa on 10 December 2013 on the basis of her relationship with her sponsor, Mr Salman Berjees, a 31 year old Australian citizen. Mr Berjees is the review applicant in this matter. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate found that the parties were not validly married, and they did not satisfy the requirements for a de facto relationship at time of application.
4. A copy of the decision record was submitted to the Tribunal by the applicant for the purposes of the review.
5. Mr Berjees appeared before the Tribunal on 19 August 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, Ms Sofia Salman, via phone.
6. The review applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. Partner visas involve a two stage process. The visa applicant must hold a provisional visa in order to be granted a permanent visa. The grant of the provisional visa enables the visa applicant to travel to and remain in Australia on a temporary basis. The grant of a permanent visa may subsequently be considered, and generally depends on whether the relationship has continued for a period of at least 2 years.
9. The criteria for a Subclass 309 visa are set out in Part 309 of Schedule 2 to the Regulations. One of the criteria to be satisfied at time of application is that the visa applicant is the spouse or de facto partner of, or intends to marry, an Australian citizen, Australian permanent resident or eligible New Zealand citizen; and any such intended marriage will be a valid marriage under the Act: cl.309.211. At the time of decision, the visa applicant must continue to be the spouse or de facto partner, and in the case of a visa applicant who at time of application had intended to marry, the marriage has taken place and the applicant continues to be the spouse, at the time of decision: cl.309.221 and cl.309.224.
10. **Background**
11. The Tribunal notes at the outset that the status of the parties' relationship at time of application was both complex and unusual, as detailed below.

12. Mr Berjees' evidence is that he married Samantha Garvill on 3 June 2007 in Australia and they had one child of that relationship. The relationship lasted 4 years. In 2012 his family arranged for him to marry Amina Khalid in Pakistan on 7 December 2011, however the parties found that they were not suited and they divorced in Pakistan on 22 July 2012.
13. Mr Berjees said that in June 2012 his sister introduced him to the visa applicant, Sofia Salman (Sulheri). He said that his family and Sofia's family both supported their relationship, so they married in Pakistan on 21 March 2013.
14. Mr Berjees acknowledged that he was legally married to Samantha Cargill at the time of his marriage to Amina Khalid in 2012 and also at the time of his marriage to Sofia in 2013.
15. Mr Berjees divorced Samantha Cargill on 28 September 2013. Ms Salman applied for the partner visa on 10 December 2013.
16. Mr Berjees told the Tribunal that, when he became aware that his marriage to Ms Salman was not lawful, which appears to be when the Department refused Ms Salman's visa, he registered his marriage with Ms Salman for the second time in Pakistan on 27 February 2015 in order to make the marriage 'legal'.
17. Both parties submit that they have been in a genuine partner relationship since they married in March 2013, that at the time of application they had the intention of marrying, and that at the time of decision they are legally married.

18. The delegate's decision

19. The primary decision records that the delegate was not satisfied that Ms Salman and Mr Berjees were in a genuine and continuing relationship as required by law. It was noted that, while the parties provided some evidence to support their claims, that evidence was very limited and does not exhibit the usual indicators of a genuine and continuing relationship. In particular, the delegate found that Ms Salman demonstrated minimal knowledge of Mr Berjees' previous relationships and personal circumstances at the interview on 12 May 2014. She initially said that Mr Berjees had divorced his first wife in 2008. When told that Mr Berjees was not divorced until September 2013, Ms Salman denied that this was true, then said that she had not read his divorce certificate. Ms Salman also referred to Mr Berjees' child as a 'son', whereas Mr Berjees has a daughter.

20. Whether the parties are in a spouse relationship

21. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
22. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act: s.5F(2) (a).

ARE THE PARTIES VALIDLY MARRIED?

23. In the Application for migration to Australia by a partner Form 47SP, Ms Salman said at Question 55 that she married Mr Berjees on 21 March 2013 at Lahore, Pakistan. At Question

63 in the application form Ms Salman stated that her partner had previously married Samantha Anne Cargill on 3 June 2007 and that they divorced on 27 August 2013.

24. In support of her application Ms Salman submitted:

- A copy of a marriage registration certificate issued by the Government of Punjab Pakistan which states that Sofia Selehri and Salman Berjees were married on 21 March 2013; and
- A copy of a divorce order issued in the Federal Circuit Court of Australia which states that the marriage between Salman Berjees and Samantha Berjees was terminated on 28 September 2013.

25. The Tribunal asked Mr Berjees if he was still married to Samantha Cargill/Berjees when he married Ms Salman in Pakistan. He confirmed that this was the case. The Tribunal notes that Ms Salman's written statement to the Department of 13 May 2014 says that she was aware when she married Mr Berjees that he had not yet divorced Samantha, however he told her that he would arrange the divorce when he returned to Australia.

26. The Tribunal has had regard to a submission from Mr Berjees' representative, in which it is claimed that Mr Berjees was not aware that he could not legally marry Ms Salman without a legal divorce from Ms Cargill. The Tribunal has difficulty accepting this argument, as Mr Berjees has lived in Australia since January 2005 and it is expected that during that time would have acquired a basic understanding of Australian marriage law.

27. The representative submits that, when Mr Berjees became aware that he was not legally married to Ms Salman, he went to Pakistan in February 2015 and registered their marriage once again so it could satisfy the legal requirements of marriage. Their subsequent marriage ceremony was conducted on 27 February 2015.

28. The Migration Act limits the scope of foreign marriages which are recognised in Australia as valid under the Marriage Act. Under Part VA of the Marriage Act, foreign marriages that are recognised under the law of the country in which they are solemnised will be recognised in Australia as valid (s.88C), subject to five basic exclusions (s.88D).¹ The exclusions are similar to the grounds on which marriages solemnised in Australia are void. Relevantly, a foreign marriage is not recognised in Australia as valid if either of the parties was married to someone else and that other marriage was recognised in Australia as valid.

29. On the evidence, and having regard to the Marriage Act, the Tribunal finds that the 'foreign' marriage between Mr Berjees and Ms Salman on 21 March 2013 is not valid because Mr Berjees was married to Samantha Berjees at that time and that marriage was recognised in Australia as valid.

30. Accordingly, the Tribunal finds that at the time of application the parties were not married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

WERE THE PARTIES IN A DE FACTO RELATIONSHIP?

31. As the Tribunal finds that the parties were not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the

¹See ss.88B, 88C and 88D of the Marriage Act.

exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

32. In forming an opinion whether the parties were in a de facto relationship at time of application, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

33. *Financial aspects*

34. Mr Berjees told the Tribunal that he has provided Ms Salman with financial support on a regular basis since their marriage in March 2013. He said that he initially transferred the money to his parents who passed it to Ms Salman, however more recently he has sent money directly to Ms Salman. In support of his claims Mr Berjees submitted copies of his ANZ bank statements which show regular deductions to the UAE Exchange, however these relate only to the period November 2012 to January 2013 and do not indicate to whom the funds are transferred. The Tribunal is mindful that Mr Berjees may have been financially assisting his parents, and not Ms Salman.
35. The Tribunal has considered a copy of a cheque from HBL Bank which indicates that the parties have a joint bank account. This does not indicate however when they opened the account or the nature of the transactions. The Tribunal does not accept that this is evidence of shared financial resources or joint financial decision-making.
36. The Tribunal has had regard to copies of money transfers from Mr Berjees to Ms Salman during 2015, however this evidence does not demonstrate that he was providing her with financial support at the time of application. Nevertheless, given that the parties were living in different countries at the time of application, the Tribunal gives little weight to this aspect of the relationship.

37. *Nature of the household*

38. The parties' evidence is that they lived together in the home of Mr Berjees' parents for 5 weeks following their 'marriage' in March 2013, and that Ms Salman has remained living with her parents in law since that time. There is no probative evidence before the Tribunal that Ms Salman has been living with Mr Berjees' parents since March 2013, and in their recent affidavits neither her mother in law nor her sister in law refer to Ms Salman living with her parents in law.
39. The Tribunal gives little weight to this aspect of the relationship, given that the parties have lived in different countries since April 2013.

40. *Social aspects*

41. The Tribunal accepts the oral and written evidence that the 'marriage' ceremony held in March 2013 was attended by both parties' family members. The Tribunal has had regard to photographs of the ceremony and of the parties in other social settings. The Tribunal is surprised that, given the parties evidence that their families arranged the marriage between the parties, the only supporting statements submitted in support of Ms Salma's visa application were from two of Mr Berjees' friends in Australia (Mohitash Vikash Nand and Khurram Mohammed), neither of whom had met Ms Salma.

42. On 12 August 2015 Mr Berjees submitted statutory declarations from his mother and sister, from Ms Salma's mother and from three friends (Mohitesh Vikash Nand, who previously provided a supporting statement, Asif Mohammad and Danielle Lattin). While noting that Ms Lattin refers to having spoken with Ms Salman on the phone, the Tribunal gives the statements from these three friends little weight, on the basis that they have not met Ms Salman and their knowledge of the parties' relationship appears to be based entirely upon information provided by Mr Berjees.
43. The affidavit from Zara Manan, Ms Salman's sister, attests to the parties having a genuine relationship. She says that she introduced her brother Salman Berjees to her friend Sofia Salman in June 2012, she attended their wedding in March 2013, and has interacted socially with the parties during Mr Berjees' visits to Pakistan.
44. The affidavits from Asima Bejees, Mr Berjees' mother, and Sarfar Ghaffarm, Ms Salman's mother, are very similar in content and attest to the parties having a genuine and continuing relationship.
45. The Tribunal accepts that the parties have participated in a 'marriage' ceremony and have socialised together in Pakistan. The Tribunal also acknowledges that the parties' respective families have expressed strong support for the 'marriage' between the parties. However, the Tribunal finds that this evidence of social recognition is not sufficient to overcome the problems in the other evidence before it.

46. *Nature of the commitment*

47. The parties demonstrated that they have a broad knowledge of each other's personal, work and family circumstances. They gave generally consistent responses when asked about their future plans – to buy a house, start a business and have a baby. The Tribunal found their evidence to be well-rehearsed, particularly in regard to the inconsistencies identified by the delegate in the decision record. The Tribunal noted that the delegate's decision indicated that Ms Salman had very little knowledge of Mr Berjees' personal circumstances and previous marriages, and she had said that Mr Berjees had a son, not a daughter. When asked about this, Mr Berjees said that Ms Salman's evidence at that time was not good because she was so nervous. While mindful that nervousness can impact negatively on the clarity of one's evidence, the Tribunal does not accept that nervousness can explain such significant inconsistencies.
48. The parties told the Tribunal that they communicate every day, and Mr Berjees submitted a number of copies of social networking (WhatsApp) interactions in support of this claim. The Tribunal notes that none of the documents are dated, and the content of each communication is brief. The Tribunal is not satisfied that this evidence indicates that the parties had regular communication at the time of application.
49. The Tribunal has had regard to a copy of Mr Berjees' superannuation account which names Ms Salman as his beneficiary. However the document dated 11 June 2015 refers to having received his binding death benefit nomination form and updated the records to reflect his instructions. It appears that Mr Berjees did not nominate Ms Salman as his beneficiary until more than 2 years after their 'marriage'.
50. The Tribunal has had regard to the parties' most recent statutory declarations, received 12 August 2015, which detail the development of their relationship, ongoing contact and their plans for the future. It is the Tribunal's view that, since the visa refusal, the parties have actively gathered evidence to support their claims of a genuine partner relationship. The Tribunal is not satisfied however that the additional evidence submitted, or the parties oral

evidence at hearing, adequately supports their claims that at the time of application they had a genuine commitment to a future together.

51. *Overall assessment*

52. Mr Berjees submitted an array of written evidence prior to the hearing supporting his claim that he is in a genuine partner relationship with Ms Salman. This evidence pertains to the time of decision criteria, but does little to assist the Tribunal in assessing the parties' relationship at time of application.
53. The Tribunal has had regard to the judgements of *Bretag v MILGEA*² and *Jayasinghe v MIMA*³ in regard to its consideration of evidence subsequent to the visa application. In '*Bretag*' the court held that, in determining the nature of a relationship at a particular time, evidence of subsequent events may be taken into account if it tends to logically show the existence or non-existence of the relationship at that particular time. However the Tribunal must be careful not to attribute too much weight to the evidence of subsequent events.
54. The Tribunal's opinion is that the parties' oral evidence, while generally consistent, was well-rehearsed. The Tribunal accepts that the parties have met personally and socialised together in Pakistan, and that written statements suggest that the relationship is supported by their respective families. There are aspects of the parties' circumstance, however, which lead the Tribunal to doubt that the parties have entered into a genuine partner relationship.
55. The Tribunal notes the delegate's finding that, when interviewed in May 2014, Ms Salman knew very little about Mr Berjees' daughter in Australia with whom he has regular contact and ongoing financial responsibility. If the parties genuinely intended to live together in Australia as partners, it is expected that they would have discussed Mr Berjees' relationship with his daughter and her involvement in their future lives together. The interview was conducted 14 months after the parties 'married', and their evidence is that they maintained regular communication after their 'marriage', even though they lived in different countries. Also, Ms Salman also indicated at interview that she had little knowledge of Mr Berjees' marital status at the time she married him, despite the evidence given by both parties and their families that Mr Berjees was totally honest about his previous marriages. The Tribunal considers that this raises significant doubts about the parties' claim that they shared personal information in a manner consistent with being in a genuine and committed relationship.
56. The Tribunal is mindful that a person's desire for Australian residency is not necessarily inconsistent with that person having a genuine partner relationship with the sponsor. In the case of *MILGEA and Dhillon* [1990] FCA 144, the Federal Court stated "people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."
57. The Tribunal acknowledges that arranged marriages are common in Pakistan, and that there are instances when the parties meet for the first time at the marriage ceremony. While taking account of such cultural practices, and being aware that relationships come in many forms,

² [1991] FCA 582

³ [2006] FCA 1700 (Middleton J, 12 December 2006) at [35], citing *MIEA v Pochi* (1980) 4 ALD 139 at 160, per Deane J.

for the following reasons the Tribunal is not persuaded that this relationship was arranged with the objective of the parties having a genuine and continuing relationship.

58. Firstly, the Tribunal considers it unusual that Ms Salman's Pakistani parents would want their daughter to marry a man who had been married twice and has an 8 year old daughter from one of those marriages. Further, his second marriage lasted just 7 months. It is the Tribunal's view that Mr Berjees' relationship history raises questions about his willingness to commit to a long-term relationship, and that most parents would have some doubts about their daughter's security in such circumstances. Even if Ms Salman's parents were willing to consider Mr Berjees as a potential partner for their daughter, the Tribunal expects that they would have taken some time to get to know him and satisfy themselves that his intentions were genuine. However the evidence before the Tribunal is that Ms Salman's parents met with Mr Berjees' parents for the first time in August 2012, and, without having actually met Mr Berjees, agreed to hold an engagement ceremony in September 2012. The Tribunal considers it significant that Mr Berjees did not attend his engagement ceremony, and the only reason given is that he had 'work commitments' in Australia.
59. Secondly, given that he had had two unsuccessful marriages, the Tribunal considers it highly unlikely that Mr Berjees would agree to marry a woman he had not met in person if he was committed to a genuine and continuing relationship with her. This seems particularly implausible given Mr Berjees' evidence that his parents arranged his marriage to Amina Khalid (his second wife), however after their marriage they 'started knowing each other' and discovered that they were not compatible. The Tribunal also questions Mr Berjees' commitment to a genuine relationship with Ms Salman on the basis that he entered into a marriage with her while being married to another woman.
60. Thirdly, the Tribunal finds it difficult to accept that Ms Salman, a tertiary-educated 28 year old woman, would agree to marry Mr Berjees knowing that he had been married twice, that his second marriage had been quite brief, and that his daughter would be part of their future together. Even if Ms Salman was attracted to Mr Berjees despite knowing his circumstances, the Tribunal expects that she would have wanted to meet him in person before agreeing to marry him.
61. Having considered the totality of the evidence, and having had regard to the relevant considerations in r.1.09A, the Tribunal finds that there are significant factors that weigh against a finding that at the time of application the parties had a genuine and continuing de facto relationship.
62. The Tribunal is not satisfied that at the time of application Ms Salman and Mr Berjees had a mutual commitment to a shared life to the exclusion of all others, and that the relationship was genuine and continuing. Accordingly, the Tribunal finds that they do not meet the requirements of s.5CB(2)(a) and s.5CB(2)(b) for a de facto relationship.
63. The Tribunal is not satisfied that at the time of application Ms Salman and Mr Berjees did not live separately and apart on a permanent basis. Accordingly, they do not meet the requirements of s.5CB(2)(c) for a de facto relationship.
64. Accordingly, the Tribunal finds that Ms Salman does not satisfy cl.309.211(2) of Schedule 2 to the Regulations.
65. **Did the applicant intend to marry an Australian citizen? (cl.309.211(3))**
66. In a written submission, dated 12 August 2015, Mr Berjees' representative argues that, while the parties were not lawfully married at the time of application, they had an intention to marry, thus cl.309.211(3) is satisfied.

67. It is further argued that at the time of decision the marriage has taken place and the applicant continues to be the spouse of the intended spouse, therefore cl.309.224 is satisfied.
68. The issue in this regard is whether, at the time of application, Ms Salman intended to marry Mr Berjees. It is the Tribunal's view that this was not Ms Salman's intention at the time of application, on the basis of the following evidence:
- Ms Salman stated in her visa application that she had married Mr Berjees on 21 March 2013, and provided a copy of a marriage certificate to that effect;
 - Ms Salman's written statement, submitted with her visa application, refers to her marriage to Mr Berjees and refers to his sister Zara as her sister-in-law;
 - Mr Berjees' written evidence is that he was not aware that he could not legally marry Ms Salman before divorcing his first wife, which indicates that he believed that he was legally married to Ms Salman at the time of application;
 - The primary decision records that Ms Salman said at interview on 12 May 2014 that she was married to Mr Berjees and that he had divorced his first wife in 2008;
 - In a statutory declaration dated 8 May 2015, Ms Salman states that "it was unfortunate that our marriage in March 2013 was not considered valid by department" and so we got remarried in 27 February 2015;
 - Statutory declarations from Mr Berjees' friends and family refer to the parties being in a married relationship since March 2013; and
 - Mr Berjees divorced Ms Cargill in September 2013, yet Mr Berjees and Ms Salman did not enter into a valid marriage until 27 February 2015.
69. On the evidence, the Tribunal concludes that at the time of application Ms Salman considered herself married to Mr Berjees, and her visa application was made on that basis. Accordingly, the Tribunal is not satisfied that at that time Ms Salman had the 'intention' of marrying Mr Berjees, as she believed that she was already married. The Tribunal finds that the requirements of cl.309.211(3) are not met.
70. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

71. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Catherine Wall
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).